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P Gilbert Laurie Esq

February 19. 1778.

22^d February
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UNTO THE RIGHT HONOURABLE,

The Lords of Council and Session,

THE

PETITION

OF

GILBERT LAURIE of Polmont, Esq; &c.

HUMBLY SHEWETH,

THAT the muirs of Reddingrig and Whitesiderig lie within the ancient barony of Kerse, which, before the Reformation, were the property of the abbot and convent of Holyroodhouse. They were understood to be the common muirs of the barony, and were possessed in common, by pasturage, casting feul, seal, and divot, by those who possessed the other lands within the barony.

It appears, that at different periods prior to the 1552, the abbots feued out parcels of the foresaid barony, with *parts and pertinents*, to different persons, to be held by them of the abbot and convent; and particularly that they had granted *feu-rights* in those terms to the predecessors and authors of the Earl of Dunmore, John Sinclair, and the trustees of Drummond of Grange.

After these parts had been so feued out, Robert, commendator of Holyroodhouse, in 1552, granted a *feu-charter* of a number of lands specially enumerated, being the whole of the barony that remained.

remained with the abbot after the feus above mentioned; and, among others, the lands of *Whiteside* and *Redding* to the Duke of Chastlerault, the predecessor of the Duke of Hamilton; and in the *Tenendas* of this charter there is the following clause: "Com-
 " *communi pastura, libero introitu et exitu, et cum omnibus aliis*
 " *et singulis libertatibus, commoditatibus, proficiis, assamentis,*
 " *et justis suis pertinentiis quibuscunque, tam non nominatis quam*
 " *nominatis, tam sub terra quam supra terram, procul et pro-*
 " *pe, ad predictas terras, molendina, et piscarias, cum universis*
 " *et singulis suis pendiculis, respectu pertinentiis*."—to be held of the abbot for the feu-duties therein mentioned.

About the beginning of the Reformation, the whole lands, property and superiority, of this abbacy, under the exception of the the anterior feu-rights, were resigned in the hands of the crown, in favour of Sir Lewis Ballandine of Broughton; who obtained a charter of resignation and confirmation, with a *Novodamus*, and an erection into a new barony, to be called *the barony of Broughton*; and in this manner the Duke of Chastlerault became vassal to Sir Lewis Ballandine, then came in place of the abbot and convent of Holyroodhouse.

William Ballandine, the son and heir of Sir Lewis, sold and disposed to James Marquis of Hamilton, the superiority of the whole lands contained in the above-mentioned feu-charter 1552; upon which the Marquis, of this date, obtained a charter of resignation from the crown, with a clause of *Novodamus*, erecting these lands in his favour into a lordship, barony, and regality, to be called in time coming, *the lordship, barony, and regality of Abbotshere*.

The family of Hamilton having, in this manner, consolidated the property with the superiority, followed out the plan of the abbots of Holyroodhouse, by granting feus from time to time of parcels of their property, upon different conditions, and in different terms. Some of these feu-rights contain a grant in favour of the feuers of the particular lands, with *parts* and *pertinents*; and the rights in favour of others of these feuers contain a grant of a right and interest in the foresaid muirs *per expresseum*.

As by the granting of these feus a number of different persons came to have rights, either of common property or of servitude, upon the muirs of Reddingrig and Whitesiderig, and thereby a great tract of land was left uncultivated; so, to remove this evil,

will, Mr. Robert Hunter, proprietor of the lands of Middlerig and Elrig, parts of the foresaid barony, Robert Johnston of Overtown, and James Beveridge merchant in Edinburgh, brought an action against the Duke of Hamilton, and others claiming an interest in that common, upon act 38. parliament 1695, libelling upon that statute, and setting forth, That the pursuers were proprietors of, and stand heritably infeft and seised in the lands and others libelled, and have been in the immemorial possession of the common muirs or commonities lying adjacent thereto, commonly called, and known by the name of, *the common muirs or commonities of Reddingrig and Whitesiderig*; and thereupon concluding in common form.

This action came in course before the Lord Coalston Ordinary; and a proof having been led, and reported, and the sundry claimants having produced their title-deeds, it from thence appeared, that the whole of them might be reduced into three different classes. The first class contains the feuers who had feued their lands from the abbots of Holyroodhouse prior to the foresaid feu-right in favour of the Duke of Chastlerault in 1552. The second class were such as had procured their feus from the family of Hamilton, and whose feu-rights contain a grant of their lands with parts and pertinents.

And the third class consisted of the feuers of the family of Hamilton, whose titles contain, in the dispositive clause, an express grant of an interest in the common, by a clause generally conceived in the following terms: "With houses, biggings, yards, mosses, muirs, meadows, tofts, crofts, parts, pendicles, and pertinents; together with the pasturage of cattle, and privilege of common, within the bounds of the common muir of Reddingrig and Whitesiderig, conform to old use and privilege, belonging to the said lands; and all other liberties and common duties used and wont."

The Lord Coalston Ordinary, upon advising mutual memorials, July 24. 1767. pronounced a very long and accurate interlocutor, determining the rights of the several claimants; and his Lordship having afterwards reported the cause, the same judgement, with very little variation, was pronounced by your Lordships. July 30. 1768.

By these judgements, the heritors in the first and second classes were found to have rights of common property; but those in the third class were found to have right to servitudes only; and that they

they were to be continued in possession of their respective servitudes, until such time as shares shall be set off to them as aforesaid.

The foresaid interlocutor did further find it proved, That the tenants and possessors of the lands of Hill of Polmont, Nether-Mumerals, Begg's possession near Bonhouse-mill, Marryslats, and Seggyhole, being all parts of the barony of Abbotkirk, have immemorially possessed the muirs of Reddingrig and Whitesiderig, as part and pertinent of their respective farms; and therefore find, That the defender, the Duke of Hamilton, as proprietor of these lands, is to be considered as a joint proprietor, intitled to draw a share in the division, according to the valued rent of these farms; and find him also intitled to a share in the division, according to the valued rent of these farms, which are *in pari casu* with Gilbert Laurie's farm; and which are hereby found intitled to be continued in possession of their respective servitudes, till such time as shares shall be set off to them as aforesaid; and find, That the share to be set off to the Duke of Hamilton shall be burdened with the servitudes due to those farms lying within the barony of Abbotkirk which are hereby found intitled to servitudes only.

The cause, in absence of Lord Coalston, was remitted to the Lord Justice-Clerk, to decide what points farther remained undetermined; and his Lordship, upon advising memorials, of this date, pronounced an interlocutor, which, in so far as respects the present question, is in these terms. "And whereas, by the aforesaid interlocutor of 30th July 1768, the Duke of Hamilton is found intitled to a share in the division, according to the valued rent of those farms holding of him which are *in pari casu* with Gilbert Laurie's; and the said Gilbert Laurie, and other feuers of Duke Hamilton who are *in pari casu* with him, are found intitled to be continued in possession of their servitudes till such time as shares of the common shall be set off to them sufficient to answer their said servitudes; also makes a *avisandum* to the Lords with these questions: *First*, Whether the said feuers can oblige Duke Hamilton to divide that share of the common which shall be allocated to his Grace, so as each feuer may have a share of the common appropriated to him, effecting to his servitude; and *2dly*, In case the feuers can force such division, by what rule the same ought to be made?"

These questions were accordingly reported to your Lordships, as also another question respecting the nature of Mr Robert Hunter's interest

interest in the commonity; and your Lordships, of this date, were Feb. 8. 1771. pleased to pronounce the following interlocutor. " On report of the Lord President, in absence of the Lord Justice-Clerk; and having advised the memorials *hinc inde*; the Lords find, That Mr Robert Hunter has a right of common property in the commonity in question, effecting to his lands of Middlerig; but that he has only a servitude upon said commonities, effecting to his lands of Elrig: And further find, That Gilbert Laurie, and the other defenders *in pari casu* with him, with whose servitudes Duke Hamilton's share in said commonities is burdened, cannot, upon the act 1695, insist against the Duke for a division of said share; and remit to the Ordinary to proceed accordingly."

The latter part of this interlocutor the petitioners do humbly beg leave to submit to your Lordships review. It is a question of very considerable importance to them, as well as of importance to the country in general in point of precedent. This process of division has depended in court for several years, and has been carried on at a very great expence; and if this interlocutor shall be adhered to, all that has been done will be of very little moment. The division, no doubt, may proceed betwixt the Duke of Hamilton, and the heritors in the first and second classes; but these are few in number, and their interest in the commonity of no great value: but as to that part of the commonity which shall be allotted to the Duke of Hamilton, in his own right, and in the right of the petitioners, who are his feuers in the third class, and which will be the most considerable part of the commonity, it must remain in its natural uncultivated state, to the great loss of those interested in it, as well as loss to the country in general. If such be the law, it must be confessed, that it is very defective, and requires an amendment: but the petitioners humbly hope, that your Lordships will be of opinion, that it stands otherwise; and that your Lordships have sufficient powers, under the authority of the statute 1695, to make the division now proposed.

The great object of that statute, was the general police and improvement of the country, which therefore intitles it to the most liberal construction. And it, with submission, appears plain to the petitioners, that it was the intendment of that law, to authorise the division of all commonities which were possessed in common by different persons; and that without distinction, whether they

also another question respecting the name of Mr Robert Hunter's interest

they had only rights of common property; or where some of those interested had only rights of servitude.

It is an undeniable fact, that there are many large tracts of ground in different parts of Scotland, which remain in their primitive uncultivated state, subjected to servitudes of this kind; and these commonities were still more numerous at the date of the statute, in the 1695. The legislature cannot be supposed to have been so ignorant of the state of the country at that time, as not to know, that most of these commonities were burdened with servitudes of this nature; and therefore, when the legislature, meaning to provide a remedy for such national grievance, did authorise the division of commonities, it cannot easily be presumed, or imagined, that it could be intended to exempt from the general rule all those commonities whereof the property might be found to belong to one or more persons affected with rights of servitude in favour of others, as no reason can be assigned for authorising the division in the one case, which does not equally apply to the other.

It, with submission, cannot be disputed, that it is sufficient to constitute a commonity, that the use of the subject is common, in consequence of servitudes of common pasturage, &c. constituted over it in favours of different persons, though the property of the subject belongs to one person only. This is clearly the language of the law in the understanding of our lawyers, particularly Craig, Stair, Dirleton, &c. And indeed it is likewise clearly agreeable to the language of the statute 1695. That statute makes an exception of the commonities belonging to the King, which supposes the whole commonity to be the property of the King; and so it must follow, that it could only be in virtue of servitudes constituted upon it, that the same was rendered a commonity; and when this statute is general, authorising the division of all commonities, those belonging to the King and royal boroughs alone excepted, it is plain, that this statute authorises the division of a subject, the use of which has been rendered common by the servitudes constituted upon it, though the property belongs to one person only. And as the statute has expressly authorised such divisions to be made, *at the instance of any having interest*, it seems from thence necessarily to follow, that those having only servitudes have a good title to compel such divisions; although, in the present case, there seems scarce to be room for that question: for although the tutors of the Duke of Hamilton may not think themselves at liberty to give an

an express consent; yet the petitioners have good reason to believe, that it is their wish, that the division should proceed, as it is clearly the interest of their pupil that it should; for if it should not, the consequence must be, that all that part of the commony which shall be appropriated to the Duke, must remain in its present uncultivated state, to the loss of the country in general, and to the great loss and detriment of all the parties interested.

Neither does it, with submission, afford any argument against the plea of the petitioners, that the rule of division established by the last clause of the statute, is the valuation of the respective lands or properties of the several proprietors: for although the statute has there pointed out the rule, which in most cases was the fair and equitable rule to be followed; yet this clause of the statute is not to be so literally constructed, as in every case to be exclusive of every other rule: on the contrary, cases may occur where it could with no justice be adopted, even in a question amongst those having rights of common property; for although the right of every heritor having a right of common property in a commony, is to be presumed to be in proportion to the valuation of his several lands, yet this is only the presumptive rule; but where the rights of the parties are constituted differently, they must have effect according to the real value and extent of their interests. Thus, when a man is proprietor of a whole barony which has a commony belonging to it, there is nothing to hinder the proprietor to dispoise a part of his several lands in the barony, and to convey along with it a half, a third, or any other share of the commony he thinks proper, which may perhaps be triple the interest which the several lands would have in the commony, compared with the other lands in the barony interested in the commony; and in such case, if a division of the commony was afterwards brought, it could with no justice be maintained, that such heritor was only intitled to draw a share of the commony effeiring to the valued rent of his several lands. On the contrary, he would certainly be intitled to draw a share of the commony effeiring to that right and interest which was conveyed to him by the act and deed of the proprietor. This, and other instances which might be given, must satisfy your Lordships, that the last clause of the statute, pointing out the valuation of the properties of the different heritors, is not exclusive of every other rule; but that no more was thereby meant or intended, than to establish the general

ral rule to be followed, when there were no sufficient *data* for establishing the rights and interests differently: but where the rights and interests of the parties had been truly established by a different rule, that rule, notwithstanding the fore said clause in the statute, would fall to be adopted; as it could never be the meaning nor intendment of the legislature, to deprive any person of any of his just rights; which would clearly be the case, if a proprietor interested in a commonity was only to get a share efferring to the valued rent of his lands, when, by the express constitution of his right, he was intitled to the double thereof. The valued rent was no doubt a very just rule of division, where there appeared nothing in the rights of the parties derogatory thereto; but where the rights of the parties appeared to be established by a different rule, full justice behoved to be done thereto in the division.

And indeed, with submission, this is very clearly pointed out in the statute itself. Your Lordships, who are made the only competent judges in processes of that nature, are enjoined by the statute, "to discuss the relevancy, and to determine upon the rights and interests of all parties concerned, and to value and divide the same according to the value of the rights and interests of the several parties concerned;" plainly supposing, that there might be rights and interests of a different nature, which would require to be differently valued. And therefore it can with no justice be concluded from this statute, that although the valued rent is pointed out as the general rule of division, that therefore no division is authorised under this statute, except where that rule will apply.

Jan. 7. 1724.
Flog of Har-
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Earl of Home.

Accordingly divisions betwixt those having rights of common property, and those having only rights of servitudes, have been authorised by the court. And indeed, in the case of the muir of Foggo, the court went so far as to sustain a process of division of that muir upon the statute 1695, at the instance of one whose only interest in that commonity was a servitude of pasturage, feuel, feal, and divot; and the very question now in issue was most solemnly determined by the court, 3d June 1748, Sir George Stewart contra John Mackenzie of Delvin. In the course of a dispute that had occurred betwixt these parties, the court directed the parties to argue this question, How far, in a case where there was no common property, but a sole property subject to servitude, the subject could be divided either by common or statute law? And after hearing the cause, the Lords found, "That, without prejudice to the property
" of

of the several heritors, the surface of the moirs in question might be divided betwixt the parties according to their several interests in that surface.

That case is very similar to the present; and as the division now proposed must be clearly beneficial to all parties concerned, it is hoped the same judgement will be given now.

The petitioners do not pretend to say, that those who have only servitudes of pasturage in a common, are intitled to have parts of the property thereof appropriated and set apart to them; but what they humbly contend is, that when they had the superficial use and possession of the subject in common, they are intitled to have the surface divided, that so each of them may enjoy the same severally, reserving to the proprietor any separate right or interest not falling under the superficial use, such as that of mines and minerals, &c.; and that over the whole subject after the division, in the same manner as he was intitled to enjoy it before the division. And accordingly your Lordships have been in use in sundry processes of division, and particularly, not many years ago, in the division of the common of Tranent, to set apart particular parts of the common sufficient to answer the uses of those who had servitudes of seal and divor, &c. upon it. And what the petitioners do contend for in this case, does in effect resolve into this, That your Lordships should set apart to each of them what is sufficient to answer their respective servitudes; that they may enjoy the same severally, and thereby be free of the inconveniences and discords to which a joint and common possession is always exposed, and to prevent which was one of the great objects of the statute.

With respect to the next question, viz. By what rule the division ought to be made? the petitioners apprehend, that such rule is to be followed, by which a share of the common will be given off to each of them, answering to the real value of their servitudes. In common cases, the extent of the servitude must be ascertained by the possession; and the petitioners do not dispute, that the possession would fall to be considered by your Lordships in this case; but what they do humbly contend is, that as the present case is circumstanced, justice and equality will be done to all parties, if the valued rent of the respective dominant tenements shall be adopted.

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Your Lordships will please to attend to the nature of the rights of the parties. The abbots of Holyroodhouse, the sole proprietors of the barony of Kerse, and of the commony in question, feued out parcels of these lands, with parts and pertinents; and in 1552, the commendator of that abbacy feued out the whole remaining part of the barony to the Duke of Chastlerault. By this means, it is plain, that the feuers of the abbots had a right of common property in the commony effeiring to their respective lands, and the Duke of Chastlerault had a right of common property in the commony effeiring to the lands feued out to him; so that if a division had been brought betwixt these parties, it is plain, that the property of the whole commony would have fallen to be divided amongst the parties according to the valued rent of their respective lands.

However, the family of Hamilton, being thus proprietors of the whole barony, excepting so far as it had been feued out by the abbots, proceeded to grant sundry other feus of parcels in the barony. To some of them, these lands were granted with *parts and pertinents*, without making any mention of the commony, which are those in the second class above mentioned; and to others, which is the case of the petitioners, their lands were granted, "with houses, biggings, yards, mosses, muirs, meadows, tofts, crofts, parts, pendicles, and pertinents, together with the pasturage of cattle, and privilege of commony, within the bounds of the common muir of Reddingrig and Whitesiderig, conform to old use and privilege, belonging to the said lands; and all other liberties and commodities used and wont."

The petitioners shall not dispute, that the extent of the several servitudes would there fall to be ascertained in favour of the respective feuers, by the extent of the possession which the possessors of their respective lands formerly enjoyed in the commony, if the same did appear. But as the possessors of these lands, while the property of the family of Hamilton, were all upon an equal footing; and as it is natural to presume, that each tenant would have a possession in the commony effeiring to the value of the several lands contained in his lease; and as there is no proof in this case that a different mode of possession was followed; it must now be presumed, that the possessor of each tenement had a possession of the commony effeiring to the valuation of his several lands: and therefore, as in this case there is no proof tending to establish a different

ferent rule, it is plain, that full justice will be done to all parties, by making the valued rent the rule of the division. The petitioners will readily admit, that as a proof of the possession before the date of the feu-rights, at this distance of time, cannot be expected, that a proof of the more recent possession, carried back as far as the memory of the witnesses could go, would be presumed to be agreeable to the more ancient possession before the date of the feu-rights; but as there is nothing in the proof that points out the more recent possession to be in any respect different from what is now contended for by the petitioners, they apprehend, that the foresaid presumption does stand in full force; and do therefore humbly submit it to your Lordships, if the foresaid rule ought not to be adopted as the most fair and equitable for adjusting the respective interests of the parties.

It is, with submission, extremely clear from the conception of the foresaid feu-rights, that although they only imported servitudes, yet the whole superficial use of the commonry, which the family of Hamilton was intitled to in the right of these lands, was by the foresaid grants conveyed to the petitioners predecessors and authors respectively. They, in virtue of these grants, were intitled to a pasturage upon the commonry, equal to what the family of Hamilton had enjoyed in the right of these lands. The Duke of Hamilton, thereafter, could not have put a single hoof more upon the commonry, on account of these lands, than he could have done, if he had granted to the petitioners a right of common property.

It cannot be disputed, that if the family of Hamilton had not granted such feus, they would have been intitled, in the division, to a share of the commonry, effeiring to the valued rent of these lands: and as the petitioners have, in virtue of their rights, the same superficial interest in the commonry, that the family of Hamilton had in the right of the petitioners lands before the feus were granted, the petitioners do humbly submit it to your Lordships, if, in justice and equity, they are not intitled to have a share of the surface allotted to them effeiring to the valued rent of their respective lands, reserving to the Duke of Hamilton his right of property; and in consequence of that right, any use of the lands that is not inconsistent with the superficial use to which the petitioners are intitled in virtue of their servitudes. If a more equitable rule of division can be suggested, the petitioners shall cheerfully submit

submit to it; but, with submission, it does not occur to them, that any just exception can lie against the rule that is now proposed.

May it therefore please your Lordships, to alter the foresaid inter-locutor; and to find, That it is competent for the petitioners, to insist for a division of the surface of the muirs in question, conform to the respective rights and interests of the parties; and that the same will, in this case, fall to be determined according to the valued rent of the respective dominant tenements which have had possession of the community.

According to justice, &c.

RO. MACQUEEN.